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In the Supreme Court of the United States

OCTOBER TERM, 1984

MID-AMERICA MACHINERY COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in awarding backpay, the Board reasonably determined that a discriminatee's discharge from an interim job did not constitute a willful loss of earnings disqualifying him for backpay during a ten-week period until he found another job.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Aircraft & Helicopter Leasing & Sales, Inc., 227 N.L.R.B. 644, enforced, 570 F.2d 351 4

Barberton Plastics Products, Inc., 146 N.L.R.B. 393, enforcement denied on other grounds, 354 F.2d 66 4

George A. Angle d/b/a Kansas Refined Helium Co., 252 N.L.R.B. 1156, enforced, 683 F.2d 1296 4

Mastro Plastics Corp., 145 N.L.R.B. 1710, enforced, 354 F.2d 170 ..... 4, 5

NLRB v. *Seven-Up Bottling Co.*, 344 U.S. 344 5

Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 5

Virginia Electric & Power Co. v. *NLRB*, 319 U.S. 533 5

Webb Mfg., Inc., 174 N.L.R.B. 37, enforced, 421 F.2d 848 4

Page

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

§ 8(a)(1), 29 U.S.C. 158(a)(1) 2

§ 8(a)(3), 29 U.S C. 158(a)(3) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A46-A63) is not reported. The decision and order of the Board (Pet. App. A36-A40), including the decision of the administrative law judge (Pet. App. A5-A35), are reported at 258 N.L.R.B. 316.

JURISDICTION

The judgment of the court of appeals (Pet. App. A44-A45) was entered on August 25, 1983. A petition for rehearing was denied on November 9, 1983 (Pet. App. A64-A65). On February 9, 1984, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 8, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. A1-A4.

STATEMENT

1. The Board found that petitioner violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by discriminatorily failing to reinstate employee Robert Swaggerty following his unconditional offer to return to work after a strike.[1] The Board's order required petitioner to offer reinstatement to Swaggerty and to make him whole for losses suffered as a result of the discrimination. Following enforcement of the Board's order by the court of appeals on October 30, 1980, the Board began supplemental backpay proceedings to determine the amount owed. Pet. App. A36-A37.

2. Following a hearing the Board, adopting the findings and conclusions of the administrative law judge, determined that Swaggerty was entitled to backpay in the amount of $9,930.62 for the period from September 8, 1978, the date of his offer to return to work, until November 14, 1980, the date of petitioner's offer of reinstatement (Pet. App. A9-A16, A34, A36-A39). The Board rejected petitioner's contentions that Swaggerty failed to make reasonable efforts to obtain interim employment during parts of the backpay period and that the backpay award improperly required petitioner to compensate Swaggerty for certain commuting expenses incurred during an interim job (Pet. App. A17-A27).

In addition, the Board rejected petitioner's claim that Swaggerty's discharge from interim employment at Simplex, Inc. on November 7, 1979 disqualified him from

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[1]The Board's initial decision finding petitioner liable for these violations is reported at 246 N.L.R.B. 1176 (1979).

receiving backpay for the ten-week period following his discharge until he obtained a new job on January 21, 1980 (Pet. App. A28-A31). The Board acknowledged that Swaggerty had been warned on several occasions for "defective work," "work performance below company standards," and "poor attendance resulting in low work output," and that his termination notice listed "absenteeism, poor quality of work and bad attitude" as the reasons for discharge (*id.* at A29; RX 13-16).[2] The Board concluded, however, that "the discharge of a discriminatee for cause by an interim employer who has found his job performance to be unsatisfactory does not constitute a willful loss of earnings * * * in the absence of an offense involving moral turpitude" (Pet. App. A28). The Board found that, although the words "Drunk and Disorderly" were later handwritten on Swaggerty's termination records, and a company official testified that on the date of Swaggerty's discharge she observed from across the street that he appeared to be drunk, petitioner had failed to prove that Swaggerty was discharged for an offense involving moral turpitude so as to disqualify him for backpay (*id.* at A29-A30).[3] The Board found further that Swaggerty had exercised due diligence both in seeking employment before working for Simplex and in obtaining employment following his discharge (*id.* at A21-A27, A31). The evidence showed that following his discharge Swaggerty moved from Illinois to Kansas in order to find work and that he remained employed in Kansas from January 1980 until the backpay period ended in November 1980 (*id.* at A31).

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[2]"RX" references are to petitioner's exhibits introduced at the backpay hearing.

[3]Swaggerty testified that he had not been drinking that day (Pet. App. A30).

3. The court of appeals enforced the Board's supplemental backpay order in full (Pet. App. A46-A63). With respect to petitioner's claim concerning Swaggerty's discharge, the court stated that "it is settled Board policy, approved judicially, that the discharge of an interim employee for unsatisfactory job performance does not constitute a wilful loss of earnings unless it evidences lack of an honest good faith effort to earn a living" (*id.* at A60-A61). Noting that petitioner conceded that " 'it was not the intoxication which motivated the discharge,' " the court found that the evidence that Swaggerty may not have been successful at his work or happy about his job at Simplex was "not sufficient to establish wilful idleness" (*id.* at A62). It found further that the fact that Swaggerty remained at his subsequent job from January 1980 until the backpay period ended 10 months later was evidence that his discharge from Simplex did not reflect a lack of good faith effort to earn a living (*id.* at A63).

ARGUMENT

The rule applied by the Board—that a discriminatee's discharge from interim employment does not disqualify him for backpay following the discharge absent an offense involving moral turpitude or lack of a good faith effort to earn a living—has been approved by every court of appeals that has considered it.[4] Consistent with the teachings of this Court, the Board, in awarding backpay, has broad discretion to make employees whole for losses actually suffered

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[4]See, *e.g.*, *George A. Angle d/b/a Kansas Refined Helium Co.*, 252 N.L.R.B. 1156, 1162 (1980), enforced, 683 F.2d 1296, 1302 (10th Cir. 1982); *Aircraft & Helicopter Leasing & Sales, Inc.*, 227 N.L.R.B. 644, 645 (1976), enforced, 570 F.2d 351 (9th Cir. 1978) (Table); *Webb Mfg., Inc.*, 174 N.L.R.B. 37, 38-39 (1969), enforced, 421 F.2d 848 (6th Cir. 1970); *Mastro Plastics Corp.*, 145 N.L.R.B. 1710, 1716-1717 (1964), enforced, 354 F.2d 170, 179 (2d Cir. 1965); see also *Barberton Plastics Products, Inc.*, 146 N.L.R.B. 393, 396 (1964), enforcement denied on other grounds, 354 F.2d 66 (6th Cir. 1965).

due to unlawful discrimination, but not for losses "willfully incurred." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941); see *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Although discriminatees are required to exercise reasonable diligence in seeking and keeping interim employment, the Board's rule recognizes that jobs differ as to their inherent demands, that different employers have different standards, and that the wrongdoing employer bears the responsibility for subjecting a discriminatee to new conditions of interim work. See *Mastro Plastics Corp.*, 145 N.L.R.B. 1710, 1716-1717 (1964), enforced, 354 F.2d 170, 179 (2d Cir. 1965). Accordingly, the Board has determined that a discriminatee's discharge for failure to meet the job standards of an interim employer falls short of proof that he has incurred a willful loss of earnings so as to disqualify him for backpay following the discharge.

Petitioner concedes (Pet. 28) that Swaggerty was not discharged for an offense involving moral turpitude or lack of an honest effort to work, but simply asserts (Pet. 28-35) that the Board should apply a different rule and hold that a discriminatee is disqualified from receiving further backpay whenever he is discharged for failing to satisfy the job standards of an interim employer. As we have shown, the Board's approach is consistent with the principles governing the Board's broad discretion to remedy violations of the Act (see *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 539-540 (1943)), and has been uniformly approved. Accordingly, petitioner's contention does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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